No. 12,747

United States Court of Appeals

For the Ninth Circuit

J. R. NORBERG, an individual doing business as Norberg Adjustment Bureau; HOPE D. PETTEY, WILLIAM B. DOLPH, ALICE HUSTON LEWIS, HELEN S. MARK, ELIZABETH N. BINGHAM, D. WORTH CLARK, EDWIN P. FRANKLIN, GLENNA G. DOLPH, individually and doing business as copartners under the firm name and style of KJBS Broadcasters,

Appellants,

vs.

PAUL W. RYAN, Trustee of the Estate of Brick O'Gold (a corporation),

Appellee.

Appeal from a Judgment of the United States District Court for the Northern District of California, dated August 9, 1950 and filed August 9, 1950.

APPELLANTS' PETITION FOR A REHEARING.

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Table of Authorities Cited

Cases

Texts

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The decision of this Court seems to be predicated in part upon the point that the appellant had reasonable cause to believe that the corporation was insolvent on September 12, by reason of the fact that on said date the appellant was informed that the corporation was on a C.O.D. basis with its creditors, and also that the financial statement of the corporation had not been seen by the appellant until seven days after the aforesaid date. Appellant feels that such finding of the trial Court, which finding has been affirmed by this Court, is "clearly erroneous" under the Court rule, cited in the Court's opinion. It is not the appellant's desire or intention to reiterate any of the argument heretofore presented, but a casual reading of the reporter's transcript shows an erroneous assumption by the trial Court, and what appears also to be a confusion on the part of the trial Court.

One of the witnesses for the appellant, a Mr. Kolb, an attorney at law, did not appear into the picture until approximately ten days after the writ of attachment was levied, and the Court seemed to be confused in thinking that Mr. Kolb was counsel for the appellant, as during the testimony of Mr. Ludolph, the Court seemed to have that assumption, as stated on page 34—"He says that he closed the stores by this attachment and working through Mr. Kolb, the attorney."

Mr. Kolb had knowledge of the financial condition of the bankrupt several months prior to the writ of attachment, but this was not at all known to the appellant, and in fact Mr. Ludolph did not even inform the appellant at the time he visited him on September 9, a Friday, that there was a Mr. Kolb already attempting to collect money. Therefore, how could Mr. Kolb's testimony have any bearing on the issue if the Court was not so confused. The testimony of both Mr. Ludolph and Miss Lee indicated that when the appellant called upon Mr. Ludolph on September 9, he was shown a financial statement, but at no time during the conversation on September 9 or 10, was Mr. Norberg told by either Mr. Ludolph or Miss Lee that the corporation was insolvent, and in fact was informed that all they needed was additional cash, and they would then be able to pay their bills, that they were at that time "strapped for cash". Mr. Ludolph and Miss Lee's testimony to such effect appears on pages 32, 49, 117, 128, 129, 131, and 132. Miss Lee reiterates the financial condition of the company to Mr. Norberg when she told him that "We told him we were sound, but needed time" (Tr. p. 132).

For the purpose of the argument, we will discount any and all testimony offered by the appellant as to what occurred during the time of September 9 and 10, and also the testimony of Mr. Kolb, wherein both Mr. Ludolph and Miss Lee admitted that the corporation was solvent (Tr. pp. 81, 82, and 98).

It follows that, if the corporation was solvent on September 9 or 10, they were certainly solvent on

September 12, the date of the attachment, as it is admitted by the record that the condition of the corporation did not change in any respect from the time the financial statement was prepared in July until long after the writ of attachment was levied.

As hereinabove pointed out, Mr. Ludolph states that he showed the appellant the financial statement on September 10, which in and of itself is further proof, disregarding anyone's testimony, that such financial statement showed liabilities of $64,000 and assets over $94,000. The very fact of showing such statement to appellant would be for one purpose only and that would be to assure a creditor that he would be paid, as their financial condition was sound. The additional testimony on the part of Mr. Ludolph that they were on a C.O.D. basis certainly does not mean that they were insolvent, as a C.O.D. basis merely means a method of operation in paying bills.

Questions involved:

1. Does a C.O.D. basis mean that the corporation is insolvent?

2. Was the corporation insolvent on September 12, 1949?

The Court's attention is once more directed to the cases heretofore cited in appellant's opening brief and particularly to the following cases:

> *Gray v. Little,* 97 Cal. App. 442, at page 446: "The fact, alone, that a creditor knows his debtor to be financially embarrassed and is pressing for a payment of his claim, is not sufficient to charge

him with having reasonable cause to believe his debtor to be insolvent. Mere suspicion that the debtor may be insolvent is not sufficient to render payments received by a creditor voidable as preference, but he must have such knowledge of facts as to induce a reasonable belief of insolvency."

In re Salmon, 249 Fed. 300:

Facts: Debtor complained of being in financial difficulties.

Held:

"The law is well established that, even if the creditor entertains doubts concerning solvency of the debtor, it is not enough. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the judgment will give him preference."

In re Wolf Co., 164 Fed. 448:

Facts:

"It was plain that the company was in embarrassed circumstances. Its debts were known to be large, its operation extended, and some of them, at least, unprofitable, and new capital was needed to carry on the business."

Held:

"A creditor of a bankrupt, who is put on inquiry as to the solvency of the debtor, was not for that reason charged with notice of facts which could only be learned from intimate and inaccessible sources, such as the books of the bankrupt."

Stucky v. Masonic Savings Bank, 108 U.S. 74:

Held:

"A creditor, dealing with a debtor, whom he may suspect to be in failing circumstances, but of which he has not sufficient evidence, may receive payment without violating the law. He may be unwilling to trust him further; he may feel anxious about his claim; yet such belief as the Act requires may be wanting."

Valley National Bank v. Westover, 112 Fed. (2d) 61:

Facts: The bank knew that the bankrupt was delinquent on another claim. And it had refused earlier to make the debtor a loan, but only because the requested loan was considered too large for the capitalization of the bankrupt.

Held: The lower Court held for the trustee. Judgment was reversed.

It is stated in 8 Corp. Jur. Sec. 488:

"Mere fact that the books show that the debtor operated at a loss over a period of time does not prove an insolvency during that time."

From the foregoing, and for the sake of argument, and the following line of reason, as set forth in this Court's decision, the Court must then base its decision upon the testimony of Mr. Ludolph and Miss Lee, which occurred on September 9 and 10, and at no time during those two days or either of them was there anything said to the appellant nor was he informed in any way that the corporation was in an

insolvent condition other than that they were on a C.O.D. basis. Appellant was then also informed that they did not have in their possession at that time sufficient money to pay the appellant the sum of $1029.00. It is very elementary and appellant feels that he needs no citation of authority, that merely because a corporation, the size of the bankrupt herein, does not have in its till $1029.00 on a given date, and that they do not have enough cash and are put on a C.O.D. basis, that such fact in and of itself shows that they are insolvent, particularly where a financial statement is given such creditor for the purpose of having him wait for his money; otherwise he would have no purpose in giving such statement to the creditor.

It is therefore respectfully submitted that a reconsideration be given of this matter, and that, because of the confusion existing on the part of the trial Court, and the lack of evidence to support the trial Court's ruling, such decision be reversed.

Dated, San Francisco, California,
January 21, 1952.

Respectfully submitted,
WILLIAM BERGER,
Attorney for Appellants
and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 21, 1952.

WILLIAM BERGER,
Counsel for Appellants and Petitioners.